91-330

No. _____

In the
Supreme Court of the United States
October Term, 1991

ROLANDO CARPIO CARDERIN,
Petitioner,

v.

ORVILLE B. PUNG,
COMMISSIONER OF CORRECTIONS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a petitioner, in his initial federal Habeas Corpus proceeding, is entitled to the appointment of an attorney and an interpreter where the petitioner was in jail, could not afford an attorney, and had little knowledge of the English language or the American justice system?

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Eighth Circuit, affirming the District Court's denial of Rolando Carpio Carderin's petition for a Writ of Habeas Corpus, was filed on June 20, 1991. (A-1).[1]

The Order of the United States District Court, District of Minnesota, denying Carderin's application for a Writ of Habeas Corpus, was filed November 6, 1990. (A-5).

The Report and Recommendation of the United States Magistrate, concluding Carderin's petition for a Writ of Habeas Corpus should be denied, was filed on October 26, 1990. (A-6).

JURISDICTION

The unpublished opinion of the United States Court of Appeals for the Eighth Circuit, affirming the District Court's order denying Carderin's petition for a Writ of Habeas Corpus, was filed June 20, 1991. (A-1). Jurisdiction of this Honorable Court is invoked under 28 U.S.C.A. §1254 (Supp. 1991).

CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED

> No person shall * * * be deprived of life, liberty, or property, without due process of law.

U.S. Const. amend. V.

> (2) Whenever the United States magistrate or the court determines that *the interests of justice so require,* representation may be provided for any financially eligible person who —
>
> (A) is charged with a Class B or C misdemeanor, or an infraction for which a sentence to confinement is authorized; or

[1] A-___ refers to Appendix, page number.

(B) is seeking relief under section 2241, 2254, or 2255 of title 28.

18 U.S.C.A. §3006A(a) (Supp. 1991) (emphasis added).

STATEMENT OF THE CASE

Petitioner Rolando Carderin seeks review of a judgment of the United States Court of Appeals for the Eighth Circuit. (A-1). Federal jurisdiction was invoked in the United States District Court, District of Minnesota, the Court of first instance, by 28 U.S.C.A. §2254 (1977).

On November 4, 1987, following a jury verdict of guilty, Rolando Carderin was sentenced in Minnesota state court to concurrent terms of 54 months for first degree criminal sexual conduct and 18 months for simple robbery. Carderin appealed his conviction and sentence, but it was affirmed. *State v. Caldenia, a/k/a Carderin,* No. C8-88-233 (Minn. Ct. App. Oct. 11, 1988) *pet. for rev. denied* (Minn. Nov. 16, 1988).

Carderin petitioned the United States District Court, District of Minnesota, for a Writ of Habeas Corpus. The District Court, however, held Carderin's petition in abeyance until he exhausted his State remedies. Carderin then sought post-conviction relief in the Minnesota state courts. His post-conviction relief was denied by the trial court and affirmed. *Carderin v. State,* No. C8-90-6 (Minn. Ct. App. June 5, 1990) *pet. for rev. denied* (Minn. July 31, 1990). At this point, the District Court began to consider Carderin's petition for the Great Writ.

During the two year period in which the District Court had jurisdiction, Carderin brought four separate motions for appointment of an attorney to assist him in this, his initial Federal Habeas Corpus petition; and on two occasions he moved the District Court to appoint an interpreter to assist him. The District Court failed to rule on any of Carderin's repeated motions for the appointment of an attorney and interpreter.

On October 23, 1990, the Magistrate issued a Report and Recommendation concluding Carderin's petition for a

Writ of Habeas Corpus should be denied. (A-6). On November 6, 1990, the District Court, still without having ruled on any of Carderin's motions for appointment of an attorney and an interpreter, issued an Order stating that upon the Magistrate's Report and Recommendation and its own *de novo* review of the record, Carderin's petition for a Writ of Habeas Corpus was denied. (A-5).

On November 20, 1990, the District Court granted Carderin's motion for a Certificate of Probable Cause. (A-4). On June 21, 1991, the United States Court of Appeals for the Eighth Circuit affirmed the District Court's dismissal of Carderin's petition for the Great Writ. (A-1). The Court of Appeals held the District Court's failure to rule on Carderin's motions for appointment of an attorney and an interpreter was a *de facto* denial of the motions, and that this denial was not error.

REASONS FOR GRANTING THE WRIT

The United States District Court, District of Minnesota, failed to rule on Petitioner Carderin's four motions for appointment of an attorney and two motions for appointment of an interpreter. Carderin, a Mariel Cuban, made these requests due to his imprisonment, his indigency, and his lack of understanding of the English language and the U.S. justice system.

Carderin concedes a person does not have a constitutional right to an attorney in a Habeas Corpus action. *Pennsylvania v. Finley,* 481 U.S. 551, 555 (1987). Yet, given the recent Supreme Court decision in *McClesky v. Zant,* ___ U.S. ___, 111 S.Ct. 1454 (1991), which limits the number of Federal Habeas Corpus petitions a person may bring, the Due Process Clause of the Fifth Amendment, the interests of justice, and elementary notions of fair play and equal justice under the law mandate that an indigent, imprisoned petitioner's motion for legal counsel and an interpreter, made prior to the consideration of his first petition, be granted.

Without counsel, a petitioner, such as Carderin, will not

be able to adequately research the law and the facts or to submit an adequate petition addressing all potential issues. Should this occur, the petitioner will face an extremely heavy burden to convince a court even to hear a later Habeas Corpus petition on additional issues which could have and should have been addressed in the first petition. In short, if a petitioner is provided with representation in this first petition, all potential legal issues should be addressed the first time.

The particular and compelling facts in this case require the Court to decide standards by which a District Court may determine whether to appoint an attorney or an interpreter. Special consideration should be given to requests by a petitioner, such as Carderin, (1) who is incarcerated, and thus has limited access to legal and factual information, (2) who cannot afford counsel himself, and/or (3) who has little or no knowledge of the English language or American system of justice.

For reasons set forth above, a Writ of Certiorari should be granted in this case.

Respectfully submitted,
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APPENDIX

United States Court of Appeals
For the Eighth Circuit

No. 90-5596MN

Rolando Carpio Carderin,
Appellant,

v.

Orville B. Pung,
Commissioner of Corrections,
Appellee.

On Appeal from the United States District Court for the District of Minnesota.

[UNPUBLISHED]

SUBMITTED: JUNE 11, 1991
FILED: JUNE 20, 1991

Before ARNOLD and MAGILL, Circuit Judges, and BATTEY*, District Judge.

PER CURIAM.

This is a petition for habeas corpus brought under 28 U.S.C. § 2254 by Rolando Carpio Carderin, a prisoner in the custody of the State of Minnesota under a judgment of a court of that state. The District Court,[1] on the recommendation of a Magistrate Judge[2] dismissed the petition, and Carderin appeals.

*The Hon. Richard H. Battey, United States District Judge for the District of South Dakota, sitting by designation.

[1] The Hon. Diana E. Murphy, United States District Judge for the District of Minnesota.

[2] The late Bernard P. Becker, United States Magistrate Judge for the District of Minnesota.

The District Court considered and rejected on their merits a number of contentions raised by petitoner: (1) that his waiver of his Fifth Amendment priviledge against self-incrimination was, on account of his ignorance of the English language, not knowing and intelligent; (2) that the waiver was not preceded by warnings consistent with *Miranda v. Arizona*, 384 U.S. 426 (1966); (3) that the Due Process Clause of the Fourteenth Amendment was violated by the introduction into evidence of photographs of the victim; (4) that petitioner was arrested without probable cause; (5) that concurrent sentences for robbery and sexual assault were imposed in violation of Minn. Stat. § 609.035, and that petitioner's criminal history score was improperly calculated under Minnesota law; and (6) that petitioner received ineffective assistance of counsel on direct appeal in the state-court system.

On his appeal to this Court, petitioner does not argue the merits of any of these contentions. He claims, instead, that the District Court erred in ignoring his four requests for appointment of counsel and his two requests for appointment of an interpreter. He claims, furthermore, that the District Court did not give proper de novo consideration to the report and recommendation of the Magistrate Judge. In this connection, Carderin claims that the District Court did not examine the transcript of the trial in the state court.

Certainly the District Court should have acknowledged and ruled on petitioner's requests for a lawyer and an interpreter. What in fact occurred — dismissal of the petition on its merits without any express ruling on these requests — amounted, though, to a de facto denial of the requests, and we can review the denial. We do not see, as a practical matter, what advantage either a lawyer or an intepreter would have been to petitioner. The issues are clear-cut and thoroughly addressed in the report and recommendation of the Magistrate Judge. There is a finding that petitioner understands English well enough, and we do not think that the absence of an interpreter prejudiced any of his substantial rights. The District Court

had a duty to review the record de novo, since petitioner objected to the Magistrate Judge's report and recommendation, but we have no real reason to doubt that this duty was fulfilled. The order of the District Court recites that it is required to make de novo review and determination of the record, and represents that is has reviewed the record. Petitioner points out that the state-court transcript is not now physically in the District Court's file, but that does not mean that the Court did not review the transcript at the time it made its decision. We do not question the District Court's explicit representation that it reviewed the record de novo.

No error of law affecting petitioner's substantial rights appears, and the judgment will therefore be affirmed. We express our thanks to appointed counsel for his able service to petitioner on this appeal.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

United States District Court
District of Minnesota
Fourth Division

Rolando Carpio Carderin,
#145192,
Petitioner,

v.

Orville B. Pung,
Commissioner of Corrections,
Respondent.

Civ. 4-89-85

ORDER

Petitioner has moved for issuance of a certificate of probable cause to appeal the court's denial of his petition for writ of habeas corpus on November 6, 1990. Based upon all the files, records, and proceedings herein, petitioner's motion is granted.

Dated: November 19, 1990

Diana E. Murphy
United States District Judge

United States District Court
District of Minnesota
Fourth Division

Rolando Carpio Carderin,
Petitioner,

v.

Orville B. Pung,
Commissioner of Corrections,
Respondent.

Civ. 4-89-85

ORDER

On October 23, 1990, United States Magistrate Bernard P. Becker issued a Report and Recommendation herein in which he recommended that the application for writ of habeas corpus be denied. Petitioner subsequently filed objections which require the court to make a de novo review and determination of the record.

In his objections, petitioner claims that he is entitled to an evidentiary hearing before this court and alleges that the Report and Recommendation is a part of the conspiracy against him and that there were manifest irregularities in his trial. The court has carefully reviewed petitioner's objections and the record and concludes that petitioner has not shown that he has a right to an evidentiary hearing. Furthermore, after its de novo review, the court finds itself in basic agreement with the findings and conclusions of the magistrate.

Accordingly, based upon the above and all the files, records, and proceedings here, IT IS HEREBY ORDERED that petitioner's application for writ of habeas corpus is denied.

Dated: November 6, 1990

Diana E. Murphy
United States District Judge

United States District Court
District of Minnesota
Fourth Division

Rolando Carpio Carderin,
#145192,
Petitioner.

v.

Orville B. Pung,
Commissioner of Corrections,
Respondent.

Civ. 4-89-85

REPORT & RECOMMENDATION

ROLANDO CARPIO CARDERIN, appeared *pro se.*

LEE W. BARRY, III, Esq., Senior Assistant Hennepin County Attorney, appeared on behalf of respondent.

BERNARD P. BECKER, United States Magistrate

Before the Court is a petition for writ of habeas corpus from a state prisoner pursuant to 28 U.S.C. §2254. The undersigned United States Magistrate has jurisdiction to issue a Report and Recommendation in this matter pursuant to 28 U.S.C. §636 and Local Rule 16.

Petitioner, Rolando Carpio Carderin, was incarcerated at the Minnesota Correctional Facility, Stillwater (MCF-Stillwater), Minnesota, following his convictions for criminal sexual conduct in the first degree and simple robbery. He was sentenced on November 4, 1987, to concurrent terms of 54 months for one count of criminal sexual conduct in the first degree and 18 months for simple robbery. Petitioner appealed his conviction to the Minnesota Court of Appeals, which affirmed his

convictions and sentences. He filed a petition for further review with the Minnesota Supreme Court, which denied the petition on November 16, 1988.

Petitioner filed a petition for a writ of habeas corpus in United States District Court for the District of Minnesota on January 30, 1989. On June 13, 1989, the undersigned recommended that this petition be held in abeyance until petitioner exhausted his claims in state court.

On September 7, 1989, petitioner filed a post-conviction petition in Hennepin County District Court alleging ineffective assistance of appellate counsel. This petition was denied on December 13, 1989. Petitoner then appealed to the Minnesota Court of Appeals, which affirmed the lower court. *See Carderin v. State*, No. C8-90-6, (Minn. Ct. App. June 5, 1990) (unpublished opinion). Petitioner filed a petition for further review with the Minnesota Supreme Court, but his petition was denied on July 31, 1990. He filed an amendment to his original petition for habeas corpus on August 31, 1990.

Upon completion of his Minnesota prison sentence, on September 26, 1990, petitioner was taken into custody of the United States Bureau of Prisons (BOP) in Terre Haute, Indiana, for detention by the Immigration and Naturalization Service (INS). Petitioner's motion to substitute a party was denied by this Court on October 17, 1990.[1]

In his original petitioner [sic] for habeas corpus relief, petitioner alleges the following errors: 1) that his statements and signed confession were improperly admitted because no interpreter was provided for him; 2) that his right to a fair trial under the Fourteenth Amendment was violated when a photograph of the victim was improperly admitted; 3) that his arrest lacked probable cause; 4) that his criminal history was improperly calculated under the Minnesota Sentencing Guidelines; 5) that his Sixth Amendment rights were violated (failure to

[1] In his motion, petitioner sought to substitute the Minnesota Commissioner of Corrections with the Warden at Terre Haute.

be brought before a magistrate, no speedy trial, no impartial jury and inability to confront witnesses); 6) that his appellate counsel was ineffective; and 7) that he was denied the right to appeal and pursue a post-conviction remedy. In his amended petition for habeas corpus relief, petitioner has deleted the claim that his Sixth Amendment rights were violated and that he was denied his right to appeal and pursue a post-conviction remedy.

II. [sic] FACTS

On February 12, 1987, the Minneapolis police arrested petitioner for criminal sexual conduct. When he was arrested and interviewed for the first time, petitioner was given a *Miranda* warning which failed to include the caveat that his statements could be used against him. Nevertheless, petitioner agreed to talk. Following his statement, petitioner was taken to another area of the jail, where a second statement was taken, preceded by a complete *Miranda* warning. In both statements and in his testimony at trial, petitioner admitted sexual intercourse with the victim but claimed it was consensual.

On direct appeal, admission of the statements was challenged only on the grounds that petitioner should have been provided with a Spanish-language interpreter during his interrogation. The Court of Appeals rejected that claim. *See State v. Cardenia (a/k/a Carderin),* No. C8-88-233 (Minn. Ct. App. October 11, 1988). Appellate counsel did not raise the issue of an inadequate *Miranda* warning.

II. DISCUSSION

Although petitioner has served his full sentence, the Supreme Court has recognized that in such cases habeas corpus petitions do not necessarily become moot because "collateral consequences" may flow from convictions and extend beyond custody. *Carafas v. LaVallee,* 391 U.S. 234, 237-38 (1968). In the present case, petitioner completed his sentence on September 26, 1990, and was released and taken into custody of

the U.S. BOP in Terre Haute, Indiana, for detention by the INS and subsequent deportation. Because petitioner could suffer adverse collateral consequences, this appeal has not been mooted.[2] *See Id.* Even the "mere possibility of adverse collateral consequences is sufficient to preclude a finding of mootness." *Sibron v. New York*, 392 U.S. 40, 55 (1968). Petitioner may very well suffer collateral consequences because of the fact that aliens who have been arrested and deported and seek re-admission within five years are ineligible for visas and shall be excluded from admission into the United States. 8 U.S.C. §1182(a) (17). Any deported alien who later enters, attempts to enter, or is found in the United States shall be guilty of a felony, one punishably by a fine or imprisonment or both. 8 U.S.C. §1326.

A. Statements and Confession

Petitioner asserts he is handicapped in communication because of his Cuban nationality. He argues that he was unable to validly waive his Fifth Amendment privilege during his police interview. The state contends that petitioner hardly qualifies as being handicapped in communication and, in fact, conceded that he understands English. *See* Tr. 252. It alleges petitioner demonstrated his ability to comprehend English by telling a detective that he had to be served with "charge papers" before he could be charged with a crime, and when he interrupted the prosecutor during cross-examination and answered her question prior to it being translated. Tr. 253-254; 268.

A defendant must "knowingly and intelligently waive the privilege against self-incrimination and the right to retained or appointed counsel" before any incriminating statement can be introduced. *See Miranda v. Arizona*, 384 U.S. 436, 475 (1966). The state's burden of proving

[2] Adverse consequences have been described as disabilities or burdens which may flow from a petitioner's conviction that give him a substantial stake in the judgment of conviction and survive the satisfaction of the imposed sentence. *See Carafas*, 391 U.S. at 237-38.

that a valid waiver was given will be met if it demonstrates that the *Miranda* warning was given with a statement by the defendant that he understood those rights. *See Tague v. Louisiana,* 444 U.S. 469 (1980). The state need prove waiver only by a preponderance of the evidence. *Colorado v. Connelly,* 479 U.S. 157 (1986). Whether a defendant has waived his *Miranda* rights is a question of fact. *Lamp v. Farrier,* 763 F.2d 994, 997 (8th Cir.), *cert. denied,* 474 U.S. 1009 (1985). "The totality of the circumstances of each case must be examined to determine if an accused has made a voluntary, knowing and intelligent waiver of his rights to remain silent and to have counsel present. *Id.*

Here, the record reveals the circumstances surrounding the interviews which yielded the statements in question. At trial, Detective Robert Tichich testified as to the conversation he had with petitioner prior to the interview:

Q. [By Jean Hoag, Assistant Hennepin County Attorney] Could you tell the jury what you said to the defendant relative to the *Miranda* warning?

A. I advised him that he was under arrest for probable cause criminal sexual conduct, told him that he had the right to remain silent, told him that he had a right to have an attorney present at that time or at any time during questioning, and that if he could not afford an attorney that one would be appointed for him without cost.

Q. Did he respond to this warning as you have just recited it?

A. Yes, he did.

Q. What did he say?

A. He said he understood and wanted to talk about the case.

Tr. 215. Petitioner's trial attorney questioned Detective Tichich concerning petitioner's ability to communicate and understand in English. The detective replied, "He could understand what I was saying and I could understand what he was telling me." Tr. 217. Detective Tichich also took a written statement from petitioner and

> advised him again that he was under arrest for criminal sexual conduct, that he didn't have to talk to me if he didn't want to, that anything he did say could be used for or against him in a court of law, that he was entitled to have an attorney present at that time or at any time during questioning, and that if he could not afford an attorney one would be appointed for him without cost.

Tr. 219. Petitioner again replied that he understood and wanted to talk about his case. *Id.*

Petitioner also told Detective Tichich that he could read some English. *Id.*

> Q. When did you come to the United States? What year?
>
> A. I came to the United States in 1980.
>
> Q. 1980. And you've developed some skills in the English language since 1980, haven't you?
>
> A. Yes, I have gone to school. I have gone to school.
>
> Q. And you can get your point across in English, can't you.
>
> A. Not perfectly, because no one is perfect.
>
> Q. But you can get your point across?
>
> A. Yes, more or less.

Tr. 252.

Given the evidence of petitioner's ability to

understand English and the legal proceedings against him, the trial court correctly concluded he made a valid waiver. The evidence against petitioner was overwhelming. The United States Supreme Court has held that the "fruit of the poisonous tree" doctrine, or derivative evidence rule, does not apply to *Miranda* violations. *See Oregon v. Elstad,* 470 U.S. 298, 307 (1985). However, even if it could be concluded that the second statement should have been suppressed as a violation of the "fruit of the poisonous tree" doctrine, the statements did not likely influence the jury to convict petitioner, and any error was harmless beyond a reasonable doubt.

In light of the totality of the circumstances, this Court concludes that the state has shown by a preponderance of the evidence that petitioner made a voluntary and valid waiver of his *Miranda* rights when he indicated to Detective Tichich that he understood his rights and agreed to speak with him.

B. Photograph Evidence

Generally, the admissibility of evidence at trial is a matter of state law. *Manning-El v. Wyrick,* 738 F.2d 321, 322 (8th Cir.), *cert. denied,* 469 U.S. 919 (1984). A federal court, however, may grant habeas corpus relief when a state court's evidentiary ruling infringes upon a specific constitutional protection or is so prejudicial that is amounts to a denial of due process. *Id.*

Petitioner contends photographs of the injured victim were improperly admitted into evidence. The state asserts that the injuries the victim received during the sexual assault were relevant to the issues at trial and were accurately depicted by these photographs. It further asserts that a proper foundation was provided for these photographs and that the victim testified the photographs accurately depicted the injuries she received.

Once a still photograph is properly authenticated, it is admissible in evidence if it is helpful to the trier of

fact in understanding a fact of consequence in the litigation. *See Walle v. Sigler*, 456 F.2d 1153 (8th Cir. 1972). Testimony of a person with personal knowledge at a time relevant to the issues of the subject matter depicted in the photograph is a sufficient foundation and may support a finding that the photograph is a fair and accurate representation.

The Eighth Circuit Court has upheld the admission of photographs depicting a victim's injuries. In *Walle*, the admission of a photograph of the nude body of a murder victim lying on a slab in the morgue, and other photographs purporting to show the clothed and blood-stained body of the victim sprawled on the bed of a hotel room in which the murder allegedly took place, were found not to encroach upon a petitioner's specific constitutional right. The court held that any error in admitting the evidence was only an error of state law and not a ground for habeas relief. Similarly, this Court concludes that no constitutional right of the petitioner was violated by the admission of this photographic evidence.

C. Probable Cause

Petitioner alleges his arrest was not based upon probable cause. This issue, however, was fully litigated in the state courts, and further review of this issue was denied by the Minnesota Supreme Court. A state prisoner may not be granted federal habeas corpus relief on a Fourth Amendment ground where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim. *Stone v. Powell*, 428 U.S. 465 (1976).

> Officers have probable cause to make an arrest if
>
> at the moment of the arrest the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that an offense

has been or is being committed.

Brinegar v. United States, 338 U.S. 160, 175 (1949). In the present case, officers arrested petitioner after he was quickly identified based upon the detailed description that was provided to them by the victim. Tr. 50; 160; 170. The victim provided police with a detailed description of her attacker and petitioner matched this description. Consequently, at the time of the arrest, the officers had ample "reasonably trustworthy information" to believe that petitioner committed the crime. In addition, when the officers found petitioner he was at a bar located approximately two blocks away from the scene of the assault, and he attempted to conceal himself and elude the officers when he observed them entering the bar. Tr. 171.

D. Sentencing

Petitioner alleges that concurrent sentences should not have been imposed because the robbery and sexual assault arose out of a single behavioral incident. He argues that imposition of this sentence is barred by *Minn. Stat.* §609.035. Petitioner also argues that his criminal history score was improperly calculated. This state contends petitioner's concurrent sentence was properly calculated and imposed.

Whether different offenses are part of the same course of conduct for the purposes of sentencing is a question which is determined by examining the facts in each case. The important factors that must be considered are time and place and also whether the segments of conduct involved were motivated by an effort to obtain a single criminal objective. *See State v. Perez,* 404 N.W.2d 834, 841 (Minn. Ct. App. 1987), *pet. for rev. denied,* (Minn. May 20, 1987). Here, it is evident that petitioner's clear objective was to commit two crimes with two separate criminal objectives: To rob the victim of her property and to sexually assault her.

Where a defendant is motivated by the desire to obtain two criminal objectives, imposition of two

sentences is appropriate. *See State v. Southard,* 360 N.W.2d 376 (Minn. Ct. App. 1985), *pet. for rev. denied,* (Minn. April 12, 1985). In the present case, the facts involved in the robbery and sexual assault are intertwined. However, this Court concludes no error in sentencing occurred. The acts necessary to complete the robbery were done before the sexual assault, making them two distinct criminal acts.

This Court also concludes that petitioner's criminal history score was properly calculated. In *Perez,* 404 N.W.2d at 841-42, the court held that defendant was properly sentenced on a criminal history score of 1, where the robbery was completed before the defendant sexually assaulted his victim. Under the Minnesota Sentencing Guidelines and Commentary II. B. 101, when multiple concurrent offenses are sentenced on the same day, before the same judge, sentencing shall be in the order the offenses occurred. As in *Perez,* the robbery in the present case occurred before the rape, and the court correctly determined petitioner's criminal history score and sentenced him accordingly. Thus petitioner was not deprived of any constitutional right by receiving concurrent sentences.

E. Ineffective Assistance of Counsel on Appeal

Petitioner alleges he received ineffective assistance of counsel on appeal because his attorney did not raise the issue concerning the first incomplete *Miranda* warning and derivative oral statement. The state contends petitioner's counsel's decision was reasonable under the circumstances and that he acted appropriately in not raising this issue on appeal.

An attorney is not required to advance every conceivable argument in order to provide his/her client with effective assistance of appellate counsel. *See Evitts v. Lucey,* 469 U.S. 387 (1985). The only requirement is that appellate counsel's choice of issues do not fall below "an objective standard of reasonableness." *Id.*

citing *Strickland v. Washington*, 466 U.S. 668 (1984).

This Court must determine whether petitioner's appellate counsel played the role necessary to ensure that petitioner received a fair trial. *Evitts*, 469 U.S. at 395. However, even if appellate's [sic] counsel's representation was professionally unreasonable, this "does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. The initial inquiry is whether petitioner was prejudiced by counsel's failure to raise the issue of the incomplete initial *Miranda* warning. Here, the trial court stated that "even if the first statement had been suppressed, the petitioner's second statement was proper and admissible."

A subsequent administration of a *Miranda* warning to a suspect who has given a voluntary but unwarned statement should ordinarily suffice to remove conditions that precluded the admission of the earlier statement. *See Elstad*, 470 U.S. at 314 (1985). Under such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice to either waive or invoke his rights. *Id.*

> It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warning, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taint the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.

Id. at 303.

Here, there is no evidence that either of petitioner's statements were coerced by the police. Petitioner's second statement mirrored the first statement and was properly admitted by the trial court. The second statement was given after a knowing and voluntary waiver of *Miranda*. Consequently, admission of the first

statement did not prejudice petitioner and, if anything, was harmless error. In addition, petitioner's appellate counsel's choice of issues did not fall below "an objective standard of reasonableness." *See Strickland*, 466 U.S. at 668. In light of all the circumstances, petitioner's counsel's decision was reasonable and this Court concludes petitioner was not deprived of his constitional right to effective assistance of appellate counsel.

Based on the foregoing, and all the files, records and proceedings herein,

IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas corpus be DENIED.

DATED October 23, 1990.

BERNARD P. BECKER
United States Magistrate

Pursuant to Local Rule 16C(2), any party may object to this Report and Recommendation by filing with the Clerk of Court and serving all parties, within ten days, a writing which specifically identifies those portions of this Report to which objection is made and the legal and factual basis for that objection. All memoranda and other documents to be submitted in support of this Report must be filed within seven days of the making of any objection. Failure to comply with this provision shall operate as a forfeiture of the objecting party's right to seek review in the Court of Appeals.